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No. 90-874

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

SCHERING-PLOUGH CORPORATION, PLOUGH, INC. and PLOUGH SALES CORPORATION,

Petitioners,

vs.

RAY F. ALBANO,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. Albano's Brief In Opposition, like the Ninth Circuit's opinion that is at issue, emphasizes the very reason Plough seeks review in this Court. The issue which Plough seeks to have considered is not whether there was prejudice to Albano or fault on Albano's part, but whether a court is required to ignore the prejudice to a defendant in considering whether to impose an extended statute of limitations on an innocent defendant. It is conceded by all that such hardships do exist and that

extreme prejudice to Plough will be the inevitable result, absent review by this Court.

This Court's opinions as well as those of lower courts clearly teach that in order to determine whether a limitation ought to be tolled it is necessary to weigh the equities. It is not enough to say that a plaintiff has suffered prejudice and was not at fault. There must be some examination of the prejudice to the defendant and lack of fault by defendant as well in a weighing of the equities. Otherwise, every plaintiff who misses a statute of limitations can secure a trial on the merits simply by alleging facts showing no fault of his own.

Albano has made much of the fact that this case involves an "innocent" plaintiff (conceded by defendant only for purposes of the Motion for Summary Judgment and ensuing appeals). However, the facts show at least equally clearly that no fault whatsoever lies with Plough. When confronted with two equally innocent parties a court should be required to fairly consider the prejudice to each party. To allow a statute of limitations to be extended against an innocent party which justifiably relied on this limitation, with absolutely no consideration of the detriment to that party, is an anathema to our justice system.

In sum, the mere factual allegation that a plaintiff is innocent in failing to abide by the statute of limitations should not result in a complete and utter disregard for the defendant's prejudice and relative innocence. Thus, the Court of Appeals grievously erred in refusing to even consider the extreme prejudice to Plough. Because statutes of limitations are an intregal part of our legal system

and are relied upon as such, it is of great importance that this Court determine whether the degree of prejudice to an innocent party defendant must be taken into account in deciding whether to toll a statute of limitations.

II. With respect to the issues surrounding the Claims Assistance Act, Albano contends in his brief that it was not his fault that he did not receive a letter and therefore, the Claims Assistance Act does apply. This argument turns the entire issue of the application of Claims Assistance Act on its head. As established by the Equal Employment Opportunity Commission's Affidavit (App. E), Albano received no letter or notice because he was not covered by the Claims Assistance Act. Thus, Albano's fault is not at issue. The issue is whether he is a covered individual within the meaning of the Claims Assistance Act. Clearly he is not, and the fact that no letter was sent to him proves that he was not entitled to the extended limitations period, rather than the opposite.

As the Claims Assistance Act was passed in derogation of a statute of limitations, the burden should be on Albano to establish that he is entitled to the benefit of the Act. Whether Albano's burden is stated in terms of a condition precedent or otherwise, Albano has failed to demonstrate the application of the Claims Assistance Act to him.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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